

## Public Participation and Superfund Decision-Making in Butte—Some Suggestions for Improvement

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (James Madison, *Federalist 51*)

Who will guard us from the guardians? (Juvenal)

The Superfund decision-making process mandates public involvement and numerous institutional mechanisms are provided for public comment. The EPA has a policy mandate that holds that it is: “imperative that EPA pay close attention” to citizen input and that citizens need to be “involved in the decision-making process.” (OSWER 9230.0-18-“Incorporating Citizen Concerns into Superfund Decision-making.”) The Introduction of the EPA’s *Superfund Community Involvement Handbook* (April 2002) notes that the EPA is committed to “early and meaningful community participation during Superfund cleanup.” The agency goes on to say that community involvement and participation in decision-making is a “foundation” of the Superfund program. The *Handbook* talks about citizens “shaping” Superfund decisions. The *Handbook* further notes: “Superfund community involvement is not a public relations effort to sell the Agency or its plans to the community, nor is it just the communication of information. Community involvement is the vehicle EPA uses to get community concerns and interests to the decision-making table.” EPA endorses the core values of the International Association for Public Participation that in part include “the promise that the public’s contribution will influence the decision.” Community concerns should be reflected in agency decisions. (OSWER 9230.0-99, “Early and Meaningful Community Involvement”) In its description of the Superfund process in the January 2000 booklet *This is Superfund*, the statement is made that there is community involvement throughout the Superfund process. (p. 8) The above comments present a rather strong commitment on EPA’s part to the efficacy of public participation.

Certainly, the EPA provides numerous institutionalized vehicles of public participation—public meetings, public hearings, comment periods, etc. But the question is whether or not public participation is efficacious or do these venues of participation simply provide environmental theatre and stylized ritual. Does public comment matter? Are the forms of participation at best giving citizens the feeling that they participate in decision making without giving citizens the power to influence decisions? Is there participatory form

without substance? Should citizens bother to participate in the process? This issue came to the fore recently with regards to the BSB Health Study mandated by an EPA unilateral order, the Five-Year Review of Butte Superfund sites and the ongoing discussion surrounding the Butte Priority Soils Operable Unit. People raise the legitimate question whether or not they are wasting their time in commenting when their comments seem to have no effect.

Although the EPA has a strong mandate to involve that public regarding the development and implementation of environmental rules and regulations, this mandate does not guarantee the efficacy of public participation in Superfund decision making in Butte. Often agency personnel express exasperation at low levels of public participation in agency functions. The question often gets asked: How can we increase public participation and get more citizens involved?

My answer is that citizens will be involved if three conditions are met:

1. Citizens must know the issue, i.e. are aware of the issue.
2. Citizens must see why the issue is important to them
3. Citizens must feel that their participation will have some efficacy.

If citizens don't participate, at least one of the above conditions are missing. If citizens are not participating, the EPA should not blame citizens but should evaluate the effectiveness of the agency's public involvement activities.

This paper will examine three issues: (1) What **should be** the role of public participation in Superfund decision making, (2) What **is** the role of public participation in Superfund decision making, and (3) **How can** public participation in Superfund decision making **be enhanced**. *The focus of this discussion will be the Superfund process in Butte.*

### ***What should be the Role of Public Participation in Superfund Decision Making***

While it is indisputably the case that the EPA and MDEQ are necessary for the administration of environmental policy and the implementation of environmental programs, it is also the case that the authority of these agencies springs from the governed. The bureaucracy exists to provide services to the public and to promote the general welfare. Authority is transferred to the bureaucracy in order to achieve some public purpose and accrue some public benefit. Any exercise of bureaucratic power necessarily diminishes individual liberty. Any rule or regulation necessarily prescribes or proscribes or prohibits certain individual action. Under what conditions is this justifiable? Justification can only come if the public impacts agency decisions and forms agency decisions.

It is a basic tenet of democratic decision making that: "on all matters where social action is substituted for individual action, liberty exists only through participation either in decision making or in control of leaders who make the decisions." (Emmette Redford-*Democracy in the Administrative State*.) It is not just the ethics of democracy that mandates citizen participation, but the quality of public decisions is enhanced by public participation. The more people who are substantively involved in making a decision, the

more information and the more perspectives that are brought to that decision. Public participation means that more alternative solutions are considered and the resulting decision will have greater credibility and legitimacy. Meaningful public participation promotes public civic education and increases trust in government institutions. Efficiency is also enhanced by public participation in that public acceptance of an agency decision decreases the likelihood of prolonged challenges to that decision. The law also mandates that most public agencies take into account public comments in rendering their decisions.

Yet, research has indicated that only about one-third of public comments are accepted by decision-making agencies. There are a number of reasons, whether valid or not, for this limited public role: (1) The public does not speak with one voice-segments of the public support a decision, segments oppose it. (2) Not all public comment is of equal discernment and environmental decision-making is not a popularity contest. (3) Agencies have invested their prestige in preferred decisions. (4) There is a view that it is government that is supposed to aggregate all of the articulated interests into sound public policy. (5) Government decision-makers are influenced by their own interests, values and perceptions. (6) Agency personnel see themselves as professional scientists and/or engineers who possess the technical expertise to make the right environmental decisions. Their view is that the ordinary public does not possess this technical discernment. (7) There is a distrust of the public and a view that public participation is often too time consuming, wastes money, and allows for too much obstructionism. There are government officials who would prefer to leave the decisions to the government experts and not needlessly complicate matters by involving the public. I recall the comment of one EPA official, I believe in Ohio, who remarked that they had a pretty good decision until the public got involved and messed it up.

There are also structural limits to the extent of public participation.

1. It is a basic principle of government, particularly democratic government, that government agencies, such as EPA, have to aggregate all of the articulated public interests into some decision. Governing means to choose and deciding means choosing between alternatives and those whose alternatives are not selected will be disgruntled. No decision can totally include all perspectives on an issue.
2. The right to participate does not guarantee the right to succeed.
3. Agency rule making is not totally a democratic process.

On the other hand, there are valuable contributions that the public can make to the Superfund decision-making process.

1. Citizens know best how a decision will affect their interests.
2. Citizens know the local area.
3. Because it is concerned with the making and enforcing of government policy decisions, Superfund decision-making is as much, if not more, a political process than it is a scientific process. Cleanup decisions cannot be determined with the certitude of a mathematic or scientific theorem. Although there are those who would seek to avoid conflict by an appeal to the certainty of science (after all you can't argue with science), an appeal to "good science" cannot eliminate conflict. Correct environmental decisions lie in the realm of the probable and contingent

not the certain and absolute. As an inherently political process, the public must not only be involved but also allowed to be effective in their participation by decision makers. For example, consider Superfund's nine criteria for remedial alternatives evaluation. These criteria do not have scientific or technological certainty or precision. How they apply to perspective decisions, what they mandate and what they do not mandate, how they relate to each other, what they mean, and their significance are the result of political processes, bargaining and decision making. If one takes cost, for instance, how do you determine with scientific and technical certainty whether or not an alternative costs too much? The very standards such as contaminant action levels and the risk assessment process are infused with politics. Often action levels are the result of political bargaining and represent the lowest common denominator of what is acceptable to the various groups fighting about where the levels should be placed. The notion of value neutral decisions in Superfund is unobtainable.

4. Even decisions which are based in science and technology have to be open to public scrutiny and comment. The expert must offer his or her expert opinion to the public in the public realm. The expert's opinion must be tested, analyzed and evaluated in the public realm. We do not, even in environmental decision-making, have a government of experts. To this end, it is important to remember that not all expertise resides in government or the PRPs. Members of the general public often have extensive knowledge, experience, and expertise in the areas under consideration in Superfund. The wanton corporate hubris displayed at a recent meeting on Priority Soils where public input was characterized as the articulation of "feelings" is a disservice and mischaracterization of the value of the public participation process.

The issue of public participation in environmental decision-making is a subset of the larger question of how does one make the bureaucracy accountable and responsive to the public while at the same time ensuring that the bureaucracy will perform its functions with effectiveness and efficiency. The personnel of public agencies such as EPA are not elected. Merit and other current personnel systems can isolate agency personnel from the public. The hiring of agency personnel based on technical and scientific qualification does not ensure that these personnel will be attuned to the public process or will value the public process. There will always be tension between efficiency, effectiveness, public accountability and public responsiveness. No totally satisfactory answer has ever been given to the question: How do you balance the desired independence of decision-makers with accountability to the public? How do you incorporate "good-science" into decisions that are inherently political?

### ***The Current State of Public Participation in Superfund Decision-Making***

Are there problems with the public participation process in Superfund decision making in Butte?

Based on my participation in the Superfund process, I have reached the following conclusions:

1. The EPA seems to be content to provide public forums often more to provide information to the public rather than to involve the public in Superfund decision-making
2. The last couple of years have seen overt hostility on the part of some EPA officials to public input and participation, particularly critical public input.
3. Such things as the law, promulgated administrative rules and regulations and the fact that their decisions do have to enjoy some measure of public support limit and define EPA's commitment to public participation.
4. Some project officers see limited utility in public involvement. Their reasoning is that Superfund decisions require technical and scientific expertise that the general public does not possess and that the public's wishes do not contribute to the "good science" required for sound Superfund decisions. Their view is that the Superfund process is basically a technical, scientific process that is aided little by public input which process requires too much time and effort for the results received. I think this is a minority view.
5. More resources need to be devoted to improving the public participation process.
6. Public participation needs to be conducted in a more comprehensive and systematic way. This will require additional resources being committed to public involvement activities.
7. There still is need to sensitize agency personnel to the necessity of clear, non-technical communication with the general public. It is possible to communicate clearly with a general audience while not losing scientific precision or legal accuracy. This necessitates giving people who were hired on the basis of technical competency the additional competency of being effective spokespersons.
8. The public may be laboring under a misapprehension as to exactly what is the role of public participation in Superfund decision-making. They may think that they have a greater role than is mandated by the law.

### ***Improving Public Participation in Superfund Decision-Making—Some Suggestions***

1. There must be an articulated commitment on the part of top management to the principles of public participation. Management must establish an organizational climate that welcomes and invites efficacious public participation in Superfund decision-making. The first step would be to conduct an analysis of the basic ideas, beliefs, and attitudes that guide agency personnel with regard to public participation. After this analysis, the Montana EPA, using a consensus decision-making process, should develop its own philosophy of public participation to which all personnel should agree. Finally, training in facilitating public participation should be provided to all organizational members. One area of investigation of new hires should be their view of public participation. The EPA's *Superfund Community Involvement Handbook* notes: "Integrating community involvement into every phase of cleanup requires the commitment of all members of a Superfund Site Team." (p. 3)

2. Establish an ad-hoc citizen advisory committee to analyze and evaluate community involvement in Superfund decision-making. This committee could have representatives of all the groups which are generally involved in Superfund decision making as well as a couple of representatives of the interested general public. As is the case generally in this country, the most effective public participation is participation through a group. The requirements for effective public participation—awareness of proposed decisions; organizational ability; a knowledge of the opportunities available for participation; the ability to mobilize citizens; access to decision makers; the resources and expertise needed to make effective comments—generally mean that the most effective participation in environmental decision making is done through groups. Groups can mobilize support or opposition to an agency decision, hold agency decisions up to public scrutiny, and, if necessary, appeal agency decisions. Perhaps not surprisingly, research indicates that groups are more effective than individuals in influencing agency decisions on environmental issues. Without groups, public participation would be of limited utility.
3. It would be good for all public meetings to begin with a discussion of the role of public comment and participation in the decision-making process: what is the role and what is not the role. Citizens could then know up front what to expect from their participation. Citizens often think that the cleanup decision should be the result of public input and that the community has a veto over agency decisions. “You should always be clear about the respective roles of the participants to avoid creating unrealistic expectations about how decisions will be made.” (OSWER 9230.0-99) Meeting announcements should make clear the purpose of the meeting and how public participation will be used to shape agency decision-making.
4. In terms of meeting attendance, there is often the lament that the public does not attend these meetings. It is important to remember that public attendance at an agency meeting is a function of a cost-benefit analysis: How will I benefit from attending a meeting versus the cost (time, effort to attend, etc.). If citizens feel that attending a meeting is a waste of time, they will stay home. At present, for too many citizens, the “cost” of attending far surpasses the benefit. Case in point: the recent “open house” on the health study. (Only around nine or so citizens attended the “open house.” The rest were agency people, local government people, PRP people, MDEQ people, etc. Much effort and money was spent on this “open house.” No one could say it was effective. But EPA is repeating the same format in January. Why is there any rational expectation that another “open house” will be effective?
5. The public also will only attend a meeting if they feel that there is some efficacy in attending. If the public feels that they will have little impact, why bother to attend? That is why, it is important that EPA respond, directly, to public input. The EPA needs to clearly and directly indicate its response to public input. More may be needed than just responsiveness summaries. In short, the EPA needs to look at meeting from the public’s point of view—What and how will the public gain/benefit from coming to a meeting?
6. Environmental justice concerns must shape EPA’s community involvement activities particularly in Butte. Butte has a higher than average poverty rate as

- compared to the United States and Montana. Disproportionately, a higher percentage of low income citizens live with Butte Superfund sites. The EPA needs to be more **proactive** in reaching out to these citizens. I will discuss this at greater length in another “paper” that I am preparing.
7. Make clear the extent to which local governmental entities’ interests are considered to be part of the public participation process and the extent to which local government represents, in the Superfund decision making process, citizen concerns. What per se is the role of local government in Superfund decision-making?
  8. Encourage TAG groups to do more than simply disseminate information to the public but encourage them to also be advocates of the public interest.
  9. TAG groups could also provide training as to how to make participation in the public participation process more productive for citizens.
  10. Greater use needs to be made of non-ritualized venues for public participation. For example, public hearings and 30-Day Comment Periods, while important, do not effectively reach large segments of the public.
  11. Agencies should provide public reports or assessments of how well they are implementing their public participation programs.
  12. **Process.** In general, citizens will be more accepting of a decision if they feel that the decision makers have genuinely listened to them. They may not agree with the outcome but at least they will respect the process. “The measure of success should not be whether the community applauds the remedy because EPA did what the community asked, but whether or not EPA honestly listened to people who participated and genuinely responded to their concerns.” (*Superfund Community Involvement Handbook*, p. 6) Agencies need to demonstrate that they have listened to citizen concerns even if they have not agreed with them. For example, the agency could regularly have public meetings after a decision has been reached in order to explain the rationale for the decision and why citizen comments were rejected or accepted. (Not all citizen comments could be addressed at one meeting but if certain comments tended to have widespread support, those could be addressed.) Relying on a responsiveness summary is insufficient. It would also be useful to follow the recommendation of the International Association for Public Participation, which is endorsed by EPA, of allowing citizens to define for themselves how they will participate. (*Superfund Community Involvement Handbook*, p. 7)
  13. Agencies should be more pro-active in dealing with the media. Rather than waiting for the media to contact an agency spokesperson, agencies should seek out media contacts and make appearances on informational media programs. Perhaps having a regular, periodic column in local papers updating the community on cleanup activities could be utilized. In short, there needs to be more media outreach to the affected communities beyond those who are regular participants in the Superfund process.
  14. Agencies could also be more proactive in reaching out to the communities. For example, service clubs are always looking for speakers. Agency personnel could reach active citizens by speaking at such groups.

15. Greater attention needs to be paid to making reports, proposals, etc. user friendly. To that end, the EPA “Summary of the Proposed Plan on the Clark Fork River” was a good example of having a user-friendly document. Documents need to be seen in more than just their legal or technical light but also as documents to inform and include and empower the general public.
16. Citizens also have a responsibility to be informed about the Superfund process, about what Superfund can do and not do and to offer reasoned comments about proposed plans of action.
17. Greater attention needs to be given as to how the different parts of the Superfund public involvement process fit together, particularly from RI/FS to ROD. The BPSOU decision illustrates my point. .
18. *OSWER Directive 9230.0-18* states that: “it is important that we demonstrate to citizens that they are involved in the decision-making process.” How will this be demonstrated? It needs to be made clearer how are citizens really involved apart from participation in the formal opportunities for public comment. There needs to be evaluation mechanisms developed for assessing the efficacy of public participation.
19. In addition to the recommendations of #15, terms such as “meaningful participation,” “shaping Superfund decisions,” “influencing decisions” and other similar terms used by EPA need to be defined with some precision. Currently, they are too imprecise and amorphous. What for example, constitutes “meaningful participation”?
20. It would be beneficial to engage in a community visioning process wherever possible.
21. The agency needs to make a clear distinction between “community acceptance” as a modifying criterion in the remedy evaluation process and public participation throughout the process. To me “community acceptance” is a quantitative expression of community preference and a function of whether or not a majority of interested parties in the community support or oppose a proposed remedy. Community acceptance is a function of counting heads or hands. On the other hand, public participation is different in that it is qualitative. Public participation in a qualitative sense should impact the whole Superfund decision-making process. If one member of the public has a comment with merit, the agency should listen to that comment. The public participation element means that the public has the right and duty to understand, analyze, evaluate and recommend modifications, additions, or deletions to proposed plans of action. For example, the public can provide valuable insight as to the meaning of permanence or the relation of cost to the other criteria, etc.
22. The use of jargon must be minimized. All professions such as law and medicine have their jargon that mystifies those who do not belong to the profession. By limiting public comprehension, this mystification stands in the way of effective public participation.

Although they are inherently political decisions, Superfund decisions cannot and should not be the result of plebiscite. Government is entrusted with promoting the public interest in environmental protection. As a practical matter, the public cannot substitute its agency



for that of the government. When a proposed plan of action is submitted for public comment, we assume that that plan is the outcome of due deliberation within the agency and represents what agency personnel think is the most effective and efficient way of attacking a problem.

The above should however not be used as an excuse to limit public participation in Superfund decision-making. “While EPA retains the final responsibility and authority to decide what will happen at a Superfund site, the Agency values and seriously considers community input.” (*Superfund Community Involvement Handbook*, p. 1) For reasons already articulated, the public has a right to participate in Superfund decision-making. For reasons already articulated, public participation produces sound environmental decisions.